Peabody Coal Company *and* International Union, United Mine Workers of America. Case 28-CA-6849

July 15, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on March 12, 1982, by International Union, United Mine Workers of America, herein called the Union, and duly served on Peabody Coal Company, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 28, issued a complaint on March 30, 1982, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on November 12, 1982, following a Board election in Case 28-RC-4039, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about January 22, 1982, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On April 13, 1982, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On May 11, 1982, counsel for the General Counsel filed directly with the Board "Motions To Strike and To Transfer and Continue Matter Before the Board and for Summary Judgment." On May 19, 1982, Respondent filed an amended answer to the complaint admitting in part, and denying in part the allegations in the complaint. On May 24, 1982, counsel for the General Counsel filed directly with the Board an amendment to the General Counsel's "Motions To Strike and To Transfer and Continue Matter Before the Board and for Summary Judgment." Meanwhile, on May 19, 1982, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its amended answer to the complaint, Respondent opposes the grant of summary judgment on the grounds, *inter alia*, that the Union's certification is invalid. Respondent denies the appropriateness of the bargaining unit and contends that its request for review of the Regional Director's Supplemental Decision on Objections to Conduct Affecting the Results of the Election and Certification of Representative was improperly refused on the basis that it was untimely filed. Respondent further contends that the refusal to accept its request for review resulted in depriving it the right to an evidentiary hearing and due process of law. Counsel for the General Counsel argues that Respondent's contentions are without merit as they raise issues which were presented to, and decided by, the Board in the underlying representation proceeding.[2]

Review of the record herein, including that in the representation proceeding, Case 28-RC-4039, establishes that, upon a petition duly filed under Section 9(c) of the Act, a hearing was held before a hearing officer of the National Labor Relations Board. Thereafter, the Regional Director issued a Decision and Direction of Election on September 4, 1981, in which he rejected Respondent's claim that the Union relinquished jurisdiction over the warehouse employees in the current collective-bargaining agreement between Respondent and the Union, the "Western Surface Agreement of 1981," and that the agreement therefore acted as a bar to

[1] Official notice is taken of the record in the represenation proceeding, Case 28-RC-4039, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] The General Counsel contends that all issues raised by Respondent's amended answer were decided in the representation proceeding and that he is entitled to summary judgment as a matter of law. In this regard he moves to strike portions of Respondent's amended answer, contending that such are contrary to the facts admitted and the official record. While, for the reasons stated herein, we find that Respondent's amended answer does not present a meritorious defense to the allegations of the complaint, we do not believe such defenses should be stricken because they constitute an endeavor by Respondent to preserve a position, albeit, in our view, an erroneous one. See *Rod-Ric Corporation*, 171 NLRB 922 (1968). Therefore, the motion to strike is denied.

the Union's petition to represent a unit of such employees. Thus, the Regional Director found that while clerks or warehouse employees were expressly excluded from coverage of the agreement, nowhere had the Union agreed not to seek separate representation of these employees. He noted that a contract clause which merely excludes a group of employees from a unit description is insufficient, without more, to act as a bar, and concluded that the Union did not contractually relinquish its right to represent warehouse employees. *The Cessna Aircraft Company*, 123 NLRB 885 (1959). On September 16, 1981, Respondent filed a request for review. By telegraphic order on September 30, 1981, the Board denied Respondent's request.

On October 2, 1981, a secret-ballot election was conducted in accordance with the Regional Director's Decision and Direction of Election. Respondent filed timely objections to the election, alleging that a union representative who was also a member of the Navajo Labor Relations Tribal Council appealed to the bargaining unit employees, all of whom were Navajo, to vote as a block for the Union. Respondent contended that this constituted both an appeal to racial prejudice and an act of coercion by an official of the Navajo Nation. On November 12, 1981, the Regional Director for Region 28 issued a Supplemental Decision on Objections to Conduct Affecting the Results of the Election and Certification of Representative.

On November 27, 1981, Respondent filed with the Board a request for review of the Regional Director's Supplemental Decision which was dated November 25, 1981. By letter dated December 7, 1981, the Board, by its Associate Executive Secretary, rejected and returned to Respondent its request for review on the ground that it was not timely filed. On December 16, 1981, Respondent filed an appeal to the Board of the disposition of its request for review. By telegraphic order on January 12, 1982, the Board denied Respondent's appeal.

In its amended answer to the complaint and opposition to the Motion for Summary Judgment, Respondent contends that it timely filed its request for review of the Regional Director's Supplemental Decision on Objections to Conduct Affecting the Results of the Election and Certification of Representative and that the actions of the Associate Executive Secretary and the Board in denying its request were arbitrary and capricious, deprived Respondent of due procees of law, and did not properly interpret the Board's Rules and Regulations. Respondent maintains that the Third Circuit's decision in *Kessler Institute for Rehabilitation* v. *N.L.R.B.*, 669 F.2d 138 (1982), is directly on point and demonstrates that its filing of the request for review was improperly denied. In *Kessler Institute*, the court acknowledged that the Board's interpretation of its rules was reasonable but nevertheless held, contary to the Board, that the 3-day period for service by mail, provided in Section 102.114(a) of the Board's Rules and Regulations, should be added to the 10-day period in which exceptions to an administrative law judge's supplemental report may be filed only after the latter period expires. Respondent contends that because the original 10-day period in which it was to submit its request for review expired on a Sunday, the holiday provision in Section 102.114(a) of the Board's Rules and Regulations should be computed, as in *Kessler Institute*, so that the prescribed period of 10 days did not expire until Monday, November 23, 1981. Thus, because Thursday, November 26, was Thanksgiving, Respondent maintains that its request for review was timely filed on Friday, November 27, 1981.[3] We respectfully disagree with the Third Circuit's conclusion and adhere to our interpretation of Section 102.114(a) of the Board's Rules and Regulations. That section provides that the final day of a filing period longer than 7 days is not counted if it is a Sunday or a holiday. We have consistently held that this holiday provision applies only to the 13th day of a 10-day filing period which has been extended by 3 days due to Board service by mail. Moreover, it is well established that it is the Board's responsibility to interpret its own Rules and Regulations and that the internal administrative processes of the Board may not be probed by a party to the proceedings. *KFC National Management Company*, 204 NLRB 630, 631 (1973).

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[4]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding. We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor

[3] It should be noted that Respondent never made a request for an extension of the period in which it was required to file a request for review.

[4] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent Peabody Coal Company, a Delaware corporation with its principal office in St. Louis, Missouri, and a place of business near Kayenta, Arizona, is engaged in the mining of coal and related operations. During the past 12 months, a period representative of its operations at all times material herein, Respondent, in the course and conduct of its business operations, sold and shipped coal and related products valued in excess of $50,000 from its place of business located near Kayenta, Arizona, directly to points outside the State of Arizona. During this period Respondent, in the course and conduct of its business operations, also purchased goods and materials valued in excess of $50,000 which were transported in interstate commerce and delivered to its place of business in the State of Arizona directly from suppliers located outside the State of Arizona.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

International Union, United Mine Workers of America, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All warehouse employees employed at the Respondent's Mesa Central Warehouse, Black Mesa Surface Mine Warehouse, and Kayenta Surface Mine Warehouse, located southwest of Kayenta, Arizona; excluding all other employees, shipping and receiving clerks, buyers, receptionists, accounts payable clerks, cardex clerks, oxygen and acetylene clerks, and all other office clerical employees, managerial employees, guards and supervisors as defined in the Act.

2. The certification

On October 2, 1981, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 28, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on November 12, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about January 22, 1982, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about January 22, 1982, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in

the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Peabody Coal Company is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union, United Mine Workers of America, is a labor organization within the meaning of Section 2(5) of the Act.

3. All warehouse employees employed at the Respondent's Mesa Central Warehouse, Black Mesa Surface Mine Warehouse, and Kayenta Surface Mine Warehouse, located southeast of Kayenta, Arizona; excluding all other employees, shipping and receiving clerks, buyers, receptionists, accounts payable clerks, cardex clerks, oxygen and acetylene clerks, and all other office clerical employees, managerial employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since November 12, 1982, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about January 22, 1982, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Peabody Coal Company, Kayenta, Arizona, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Union, United Mine Workers of America, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All warehouse employees employed at the Respondent's Mesa Central Warehouse, Black Mesa Surface Mine Warehouse, and Kayenta Surface Mine Warehouse, located southwest of Kayenta, Arizona; excluding all other employees, shipping and receiving clerks, buyers, receptionists, accounts payable clerks, cardex clerks, oxygen and acetylene clerks, and all other office clerical employees, managerial employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Mesa Central Warehouse, Black Mesa Surface Warehouse, and Kayenta Surface Mine Warehouse copies of the attached notice marked "Appendix."[5] Copies of said notice, on

[5] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

forms provided by the Regional Director for Region 28, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 28, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Union, United Mine Workers of America, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All warehouse employees employed at the Employer's Mesa Central Warehouse, Black Mesa Surface Mine Warehouse, and Kayenta Surface Mine Warehouse, located southwest of Kayenta, Arizona; excluding all other employees, shipping and receiving clerks, buyers, receptionists, accounts payable clerks, cardex clerks, oxygen and acetylene clerks, and all other office clerical employees, managerial employees, guards and supervisors as defined in the Act.

PEABODY COAL COMPANY